

## **NEWS ADVISORY**

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### **MPA/MACS Calls for More Consistent Regulatory Process and Dispute Resolution for Cleanup of Leaking Underground Storage Tank Cleanup**

(LANSING) – Saying the regulatory environment for the cleanup of leaking underground storage tanks in Michigan is a “moving target,” the Michigan Petroleum Association and Michigan Association of Convenience Stores (MPA/MACS) called today for a more consistent regulatory process with the Department of Environmental Quality (DEQ) and the creation of an independent dispute resolution process.

“Working with the DEQ to clean up contaminated underground storage tank sites should not be a roll of the dice,” said Mark Griffin, president of the MPA/MACS. “Michigan small businesses need clear and consistent regulations so that sites can be cleaned up, closed and reused.”

“The ability of gas station owners to do the right thing, take corrective action and clean up or close leaking underground storage tank (LUST) sites is under increasing strain due to the ever-shifting policies of the DEQ which has overstepped its authority on this matter,” said MPA/MACS chairman Craig Hoppen of J&H Oil Company. “The increasingly complex environmental compliance requirements and the inability to close LUST sites are inhibiting job creation and business growth in Michigan.”

During testimony before a joint meeting of the Senate Committee on Natural Resources, Environment & Great Lakes, chaired by Senator Tom Casperson, and the House Natural Resources, Tourism & Outdoor Recreation Committee, chaired by Representative Frank Foster, members of MPA/MACS pointed out several key issues in the LUST regulatory program that are hindering Michigan small businesses.

“Often times, businesses face a flurry of operational memos and other red tape that make it difficult to clean up or close a LUST site,” said MPA/MACS member Pete Bosanic of PM Environmental. “What was considered clean a year ago is no longer considered clean today, creating a moving target regulatory process that makes it difficult to do business in Michigan.”

Griffin added that businesses also have no dispute resolution process to challenge DEQ decisions on LUST sites. He said that DEQ staff in Lansing has the final say on final cleanup of a LUST site, and often disagree with DEQ regional field staff about whether sufficient corrective action has been taken. It is not unusual for environmental consultants to fear the loss of their livelihood if they question DEQ decisions as the Department also has the oversight ability to eliminate their certification if they buck unnecessary or unscientific orders.

“The LUST program needs an independent dispute resolution process comprised of technical experts to challenge DEQ decisions that slow or delay closing cleaned up sites,” said Cliff Knaggs, of the law firm Knaggs, Harter, Brake & Schneider, P.C. and MPA/MACS legal counsel. “These sites can be economically viable again, yet the way DEQ is handling these sites results in uncertainty for buyers, sellers and lenders. We can no longer permit these types of hurdles for Michigan small businesses.”

Despite a cleanup funding mechanism fee of 7/8 cents per gallon on refined petroleum products which the state collects approximately \$50 million annually in the Refined Petroleum Fund from petroleum wholesalers and retailers, Griffin noted that:

- Michigan ranks 48<sup>th</sup> nationally for the percentage of LUST sites closed in a 12-month period from Oct. 1, 2009 to Sept. 30, 2010
- Michigan ranks last nationally for percentage of sites closed versus number of cleanups initiated; and
- Michigan ranks 48<sup>th</sup> nationally for percentage of sites closed versus total releases reported from LUSTs.

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The only way MPA/MACS members have access to this money is if they go bankrupt, said Griffin. The State has consistently used these funds for a variety of purposes, usually far from their original purpose rather than assisting those paying the fee in cleaning up approximately 3,000 known releases from the last 30 years. The state has been using about 40% of the money collected addressing the approximate 4,000 orphan LUST sites which have accumulated over the same time period. At any one time there may be a just a very few tanks actually leaking in the state.

The Michigan Petroleum Association and Michigan Association of Convenience Stores serves the state's independent petroleum marketers and convenience store operators. MPA/MACS has 550 member companies with over 1,500 retail locations. MPA/MACS members employ over 15,000 people statewide in all of Michigan's 83 counties.

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**NEEDED REFORMS TO MICHIGAN'S  
LEAKING UNDERGROUND STORAGE TANK (LUST) PROGRAM  
PARTS 213 AND 215 OF THE NATURAL RESOURCES AND  
ENVIRONMENTAL PROTECTION ACT (NREPA)**

**Background**

On November 8, 1984 President Reagan signed into law the hazardous and solid waste disposal amendments to the Resource Conservation and Recovery Act (RCRA) which added a new subtitle I to the federal hazardous waste statutes. The amendments required the Environmental Protection Agency (EPA) to develop comprehensive regulations to prevent, detect and correct releases from certain USTs. The amendments also encouraged states to develop, with EPA approval, their own UST regulatory programs, so long as they were no less stringent than the federal standards. The federal UST legislation appears at 42 USC §6991, *et seq.*

In response to the federal statutes, the EPA promulgated a regulatory scheme which addressed several areas, including UST design, operating requirements, upgrade and construction requirements, reporting and recording keeping requirements, as well as financial responsibility requirements and the requirement for each state to designate a state agency to implement the federal UST regulations. The regulations also address liable parties' responsibilities to respond to releases or leaks from USTs. (See, 40 CFR 280.10, *et seq.*)

**Michigan's Response<sup>1</sup>**

In response, the Michigan Leaking Underground Storage Tank Act (LUST), 1988 PA 478 (MCL 299.831, *et seq.*) was enacted. Under the 1988 LUST Act, owners and operators were strictly liable to perform corrective actions to address contamination emanating from USTs and for damages to third parties or natural resources without regard to fault. Responsible parties were required to undertake corrective action under the supervision of the Department of Natural Resources (DNR)

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<sup>1</sup>In addition to the LUST Act and the MUSTFA Act discussed herein, the Michigan Underground Storage Tank Regulatory Act (USTA), 1988 PA 479 (MCL 299.701, *et seq.*) was enacted which required registration and regulated USTs prior to discovery and reporting of a release. The USTA was recodified as Part 211 of NREPA, MCL 324.21101.

and to submit a detailed corrective action plan to the DNR for review and approval. Contaminated sites were required to be remediated to generic criterion without regard to site specific risk posed to public health, safety, welfare or the environment.

The Michigan Underground Storage Tank Financial Assurance Act (MUSTFA) was also enacted as 1988 PA 518, (MCL 299.801, *et seq.*) This statute was enacted to assist tank owners in meeting the EPA financial responsibility requirements.<sup>2</sup>

### **1995 Amendments**

Shortly after codification of Michigan's environmental laws into the NREPA, 1994 PA 451, work began to remedy several shortcomings identified in the LUST and MUSTFA programs during the six year implementation experience. A similar effort was also underway to amend Michigan's general clean-up program, Part 201 of NREPA.

Several generalized deficiencies were identified:

- Strict liability was unfair, and as with the Part 201 program, inhibited re-development of contaminated properties.
- Generic clean-up criteria resulted in an inefficient use of resources without a corresponding improvement in level of protection to public health, safety, welfare or the environment.
- The existence of the MUSTFA program significantly increased the discovery of releases from USTs which overwhelmed the DNR/Department of Environmental Quality's (DEQ) ability to conduct meaningful review and approval of required reports and corrective action plans.
- Given that public funds were being utilized to conduct corrective action, some level of quality assurance/quality control and oversight was needed for individual professionals and environmental consulting companies engaged in providing services at LUST sites.

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<sup>2</sup>All three of these enactments, LUST, USTA and MUSFTA contained six month "sun set" provisions which were eliminated in 1989 by enacting 1989 PA 150, 151 and 152, respectively.

To address the deficiencies, 1995 PA 25 and 1996 PA 116 were enacted which accomplished the following:

- Adopted Part 201's causation based liability scheme.
- Adopted the American Society for Testing and Materials (ASTM) Standard Guide for Risk-Based Corrective Action Applied at Petroleum Release Sites E1739-95 (RBCA) which effectively moved from a performance based standard to a risk based clean-up standard.
- Established a "Certified Professional" (CP) and "Qualified Consultant" (QC) program whereby the DEQ approved individuals and consultants to perform corrective action at LUST sites.
- Changed from a DEQ prior approval program to a owner/operator implemented corrective action program monitored through an "audit" program.

#### **The Status of the Current Program**

\_\_\_\_\_ Over the past seven years or so, through the publication and enforcement of Operational Memorandum, and through DEQ management policy choices, implementation of the LUST program has strayed significantly from the objects of the 1995-1996 amendments. In addition, DEQ is currently seeking support to completely eliminate the LUST program and move responsibility for oversight of LUST corrective action to the Part 201 program.

Problems associated with the current status of the LUST program are manifest in the following ways:

- Unnecessary difficulty in attaining closure of LUST sites.
- Misuse/abuse of the audit program.
- Failure to follow the ASTM RBCA process by DEQ.
- Enforcement of guidance documents, even draft guidance documents which have not be distributed to the public, as though they were law.

- Forcing CPs and QCs to perform corrective action inconsistent with the ASTM RBCA process through the threat of revoking certification.

- The lack of an unbiased, cost effective method of resolving disputes between owners, operators, CPs, QCs and the DEQ staff.

### **The Proposed Solution**

Stakeholders are proposing amendments to Parts 213 and 215 of NREPA to advance the following goals:

- Maintain separation of the Part 201 and 213 programs.
- Reform the audit program.
- Create an UST Policy Board, modeled after the former MUSTFA Policy Board, with authority to resolve disputes between owners, operators, CPs, QCs and the DEQ related to audits, corrective action, CP/QC certification, information requests and similar issues.

- Reaffirm adoption of ASTM RBCA corrective action.
- Maintain causation based liability.
- Require a more consistent implementation and application of the LUST program through the promulgation of administrative rules.

- Require a cost/benefit analysis prior changing or adopting any procedure or criterion.